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No. 97

IN THE

Supreme Court of the United States

October Term, 1952

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

vs.

THOMAS W. DANT, ET AL., COPARTNERS, *doing business as* DANT & RUSSELL, LTD.

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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CONSENT TO FILE

This brief *amicus curiae* is filed pursuant to Rule 27 of the Court's rules. The consent of both parties to the filing of this brief has been filed with the Clerk.

INTEREST OF THE CIO

The issue in this case is whether the National Labor Relations Board may validly issue a complaint in an unfair labor practice case when the charging union was not in compliance with Section 9(h) of the Taft-Hartley Act when it filed the charge, but came into compliance before the issuance of the complaint.

This question, generally speaking, arises in two different categories of cases.

There is, first, a group of cases in which the charges were filed by unions affiliated with the CIO prior to the date of the

CIO's compliance with Section 9(h), but the complaints were issued subsequent to CIO compliance. The present case is one of this group. Since the CIO initially complied with Section 9(h) on December 22, 1949, the number of cases of this type which are still unresolved is limited; and new cases of this sort will not recur. The equities of the individuals affected by these cases, whose wrongs cannot be redressed if the decision below stands, are of course entitled to full consideration however.

The other group of cases in which the same question arises is, however, of a recurrent character. In the cases in this category the union—either the CIO (or the AFL) or the international union or one or more of the locals involved—was unavoidably or inadvertently temporarily not in compliance with 9(h) when it filed the charge, but got into compliance before the complaint issued. As we shall show, unions can not avoid some sporadic periods of non-compliance, and others are virtually sure to occur through inadvertence, so that cases of this sort will constantly arise. The question before the Court thus derives its major continuing importance from these cases of temporary non-compliance rather than from the cases arising out of the CIO's initial non-compliance.

In this brief *amicus* we shall not repeat the able presentation of government counsel, but shall seek only to show, as to each of the two groups of cases presenting the issue, that both the equities and the congressional purpose will be served by holding that compliance at the time of the issuance of the complaint is what is required, and not compliance at the time of the filing of the charge.

ARGUMENT

I.

SINCE SPORADIC NON-COMPLIANCE WITH SECTION 9(h) IS UNAVOIDABLE, THE STATUTE SHOULD BE CONSTRUED TO MINIMIZE THE PENALTIES

There is no way by which unions can avoid being periodically out of compliance with Section 9(h) of the Taft-Hartley Act, no matter how hard they may try. Hence the Act should be construed so as to minimize the penalties for such sporadic

non-compliance. That can best be done by holding that compliance at the time of the issuance of the complaint is what is required, and not compliance at the time of the filing of the charge.

There is not here at stake any issue of driving Communists from union office, or of penalizing unions for refusing to rid themselves of Communist leaders. Communist-officered unions will not be able to comply either at the time of the charge or of the issuance of the complaint. The issue is simply the degree to which non-Communist unions are to be penalized for their inability or their inadvertent failure to meet, not the substance, but the red tape, of Section 9(h).

1. ***Some Sporadic Non-Compliance Is Unavoidable***

Section 9(h) of the Taft-Hartley Act is interpreted to require that there be "on file with the Board an affidavit executed contemporaneously or within the preceding twelve months by each officer" (1) of the local union, (2) of the national or international union of which the local is part, and (3) of the federation with which the national or international union is affiliated. It is plainly not possible, simply as a physical matter, for all of these affidavits to be always on file.

For example, the CIO at each annual Convention elects officers to serve until their successors are elected at the next Convention. Whenever a new officer is elected at a Convention the CIO is thus automatically out of compliance for whatever period, usually several days, is required for the transmission of the new affidavits to the Board for filing. During this period not only is the CIO out of compliance, but so is every international union affiliated with it and every local union of those international unions. This applies equally to the AFL, which likewise elects its officers at annual conventions, and, through the AFL, to the national and international unions affiliated with it and to their local unions.

In addition to these annual periods of unavoidable non-compliance to which the CIO and the AFL (and through them their affiliates and the locals of their affiliates) are subject, each national or international union and each local union will likewise be out of compliance for some period of time following each election by it of a new officer. Thus, if the international

and local unions also elect officers annually, as does the CIO, there may be three separate periods per year, of from one to several days each, during which the local union will be unavoidably out of compliance. The situation is even worse for a national or international union. For, when charges are filed by a national or international union, compliance is required not only of it (and of the CIO or AFL) but of any local unions involved as well. The local unions involved may number in the hundreds, as was the case when the United Steelworkers of America filed charges of refusal to bargain against the major steel companies last year.

Non-compliance will also occur whenever an officer dies and is replaced, whether temporarily or permanently, until the affidavit of the replacing officer can reach Washington and be filed with the Board. Since the labor movement has large numbers of officers at all levels of its organizations, instances of this sort are of frequent occurrence.

Periodic non-compliance resulting from the election of new officers could perhaps be avoided by retaining the same officers permanently, but sporadic non-compliance resulting from the death of officers appears to be quite unavoidable.

2. ***Some Inadvertent Non-Compliance Is Inevitable***

In addition to the unavoidable periods of non-compliance following the replacement of any officer of a local, international or federation, there are other periods during which unions will be inadvertently, but inevitably, out of compliance.

For example, the CIO's non-communist affidavits are normally filed immediately after each annual Convention, at which officers are chosen to serve until their successors are elected by the next Convention. However, the affidavits are, under the statute, good only for one year. Thus if one Convention follows another by any period of more than a year, say a year and a week instead of a year exactly, the affidavits will expire on their anniversary and the federation and all of its affiliates and their locals will be out of compliance. It is of course possible for the officers whose terms are expiring to file new affidavits for the remaining week or two of their terms, and this has sometimes been done. Probably more often, however, the

federations, the international unions, and the locals have simply overlooked gaps of this sort, with resulting non-compliance.

Again, often unions, and particularly local unions, sometimes simply overlook the need to refile the affidavits until something happens to draw it to their attention. Unions, it must be remembered, are not operated or staffed like banks. Both the smaller internationals and the locals operate usually without legal advice, and in the case of the latter, often without paid help of any kind.

To sum up, all unions are sometimes unavoidably out of compliance, and most unions are also, inadvertently but excusably, out of compliance at various other times also. If an unfair labor practice occurs which involves both an international union and a large number of its locals, it is highly probable that the event will find some of them out of compliance, and that they can all simultaneously be brought into compliance for even a limited time only by a concerted effort.

3. ***The Statute Should Be so Construed as to Minimize the Penalties for Technical Non-Compliance***

Since, as we have shown, every union is unavoidably out of compliance with Section 9(h) at various times, and in addition is probably inadvertently out of compliance for various other periods, the Act should, so far as possible, be so construed as to minimize the consequences of these sporadic periods of technical non-compliance, in order to avoid injustice and to facilitate orderly administration.

Ideally neither the validity of the charge or of the complaint should turn on technical compliance on the date of the filing of charge or complaint, since such compliance may be affected by so many chance occurrences. The Congress itself so recognized a year ago when it amended the Act to eliminate the union shop authorization election, among other things. The substitute provision which Congress then enacted provides that only unions in compliance with 9(h) can validly execute union shop contracts, but the validity of the contract is made to turn not on technical compliance on the date of execution of the contract, but on whether the union "has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with Sections 9(f), (g)

and (h)." Public Law 189, 82nd Congress; 29 USC, Sec. 158, as amended. As the Senate Report on this provision stated:

> "The provision for such notice affords a simple means of enabling all parties concerned to know conclusively whether the requirements of Section 9(f), (g) and (h) have been met."

Senate Report No. 646, 82nd Congress, First Session, p. 1. In contrast, the technical fact of compliance at any given time rests on adventitious circumstances and cannot be certainly known.

We believe that it would be open to the Board to give to Section 9(h) a construction which would effect a similar result. The Board could, we think, hold that the requirements of 9(h) are met if within the preceding year the union has filed affidavits by those who were officers at the time of such filing. The Board, however, has not adopted such a construction, but rather has put on the Section the technical constructions to which we adverted in demonstrating the impossibility of compliance at all times and the likelihood of non-compliance at any time.

This very strict construction which the Board has given the filing requirements emphasizes the desirability of so construing the statute as to minimize the penalties for non-compliance, as the Board has done in the ruling which is now before the Court. It is plainly open to the Court to construe Section 9(h) as requiring compliance at the time of the issuance of the complaint, but not at the filing of the charge. The literal language of the Section as well as the other considerations pointed to in the Board's brief fully support such an interpretation.

Such a construction will accord with the intention of Congress. In its 1951 amendments Congress demonstrated that it is interested in the substance of compliance with Section 9(h), not the technicalities. Moreover Congress surely meant to encourage unions to file the affidavits called for by Section 9(h), and that design would hardly be promoted by penalizing unions, which have sought to comply, for occasional unavoidable or inadvertent non-compliance.

The equities of the situation point to the same conclusion. When a union has sought in good faith to comply with Section

9(h), it is entirely equitable to permit it to use the remedial processes of the Act to redress unfair labor practices against it or its members. Where the unfair labor practices involve individuals, as do the illegal discharges which are involved in this particular case, the charge need not even have been filed by the union at all, but could have been filed by the individual employees concerned, in which event no issue of compliance would ever have arisen. This pointedly illustrates the highly technical nature of the question which is here at stake, and the injustice which would be done to the individual employees by a too strict construction of the Act. Their equities are surely not dependent on whether the union was technically in compliance when it filed the charge, or only when the complaint issued.

As far as respondents in unfair labor practice cases are concerned, their equities, or lack of them, are likewise in no way dependent on whether the charging union was in compliance on the date it filed the charge or on the date the complaint issued. From the standpoint of respondents these facts are purely fortuitous: if their unfair labor practices go uncorrected by reason of them, they have simply succeeded in thwarting the policies of the Act.

4. ***The Inequities Inherent in Section 9(h) Will Be Minimized by Requiring Compliance Only at the Time of the Complaint***

As we have shown, certain inequities and difficulties of administration are inherent in the statute, whether compliance is required on the date of the complaint or on the date of filing the charge. But these inequities and difficulties can be minimized if the Act is construed as requiring technical compliance only on the date of the issuance of the complaint.

Under such a construction, unions will be free promptly to file charges of unfair labor practices whenever they occur. (Considerable expedition is required since the statute requires that charges be filed within six months.) Then, if the charging union is notified by the Board that it or some affiliated body whose compliance is essential to its compliance, is not in compliance, it can, within the period set by the Board, endeavor to get itself and its affiliated bodies into compliance. Thus, un-

der the practice which the Board now follows a charging union is required to get into compliance within 10 days after the charge is filed; otherwise the charge is dismissed.

Under the alternative construction given the Act by the Court below, the union would have to check its compliance status and that of its affiliated bodies before filing a charge. If it or one of the affiliated bodies made a mistake, so that they were not technically in compliance when the charge was filed, their case would be dead and redress of the unfair labor practices would be forever barred.

But that is not the only, or even the major, reason for our preferring a construction of the Act which requires compliance only at the issuance of the complaint. For the choice is not really between compliance at the filing of the charge or compliance at the filing of the complaint, but between compliance at the filing of the complaint and compliance at both times. If this Court should hold that compliance at the filing of the charge is necessary, we have little doubt that the Board would, under the language of the statute, hold compliance at the time of the filing of the complaint to be necessary also. Indeed any other result would be highly anomalous, since the issuance of a complaint is a proceeding both more formal and more practically significant than the filing of a charge.

Thus the choice, as we see it, is between requiring that there be technical compliance on a single date, viz., the filing of the complaint, and requiring that there be technical compliance on two dates, viz., the filing of the charge and the filing of the complaint. The likelihood of a union's being technically not in compliance would, of course, be doubled if the requirement were applied as of two separate dates rather than as of one. We cannot believe that either justice or the intention of Congress would be promoted by such a result.

II.

UNIONS AND EMPLOYEES SHOULD NOT BE UNNECESSARILY PENALIZED FOR THE CIO'S NON-COMPLIANCE PRIOR TO THE HIGHLAND PARK DECISION

What we have said up to now has related to the difficulties of unions in remaining in compliance at all times even if they

attempt to do so, and to the bearing of these facts on the question of statutory construction which is before the Court. The present case, however, does not arise out of the difficulties or impossibility of remaining continuously in technical compliance, but is one of a group of cases which arose because the CIO did not comply with 9(h) during a period of time when (1) the Labor Board was ruling that the CIO need not comply in order for its affiliated unions to be in compliance, and (2) the CIO was litigating the constitutionality of 9(h). We believe that a review of this background will demonstrate that, as to this group of cases too, both the equities and the intention of Congress will best be served by applying the compliance requirement to the date of the complaint only.

Among the new provisions contained in the Taft-Hartley Act, which went into effect late in August, 1947, were the now well-known non-communist affidavit provisions. These provisions, found in Section 9(h) of the Act, subject a labor organization to certain enumerated disabilities unless there are on file with the National Labor Relations Board non-communist affidavits executed by the officers of the organizations and by the officers "of any national or international labor organization" of which it is an "affiliate or constituent unit."

Immediately after the enactment of Taft-Hartley the question arose whether, in order for a national or international union, such as the United Automobile Workers, to be in compliance with Section 9(h), it was necessary for the officers of any federation to which it belonged, such as the AFL or CIO, to file the affidavits, or whether it was sufficient for the officers of the national or international to file. The Labor Board held that compliance by the officers of the national or international union was sufficient, and that it was not necessary for the officers of the CIO to comply in order for the national or international unions affiliated with the CIO to be in compliance. (*Northern Virginia Broadcasters*, 75 NLRB 11, decided Oct. 7, 1947.)

In reliance upon this ruling, and pending tests of the constitutionality of Section 9(h), the Congress of Industrial Organizations decided that its officers would not comply with Section 9(h), although most of them did in fact file the affidavits as

officers of their own international unions. Eventually this Court, by a divided vote (on some issues the vote was evenly divided) affirmed lower court decisions upholding the constitutionality of Section 9(h). *American Communications Association* v. *Douds; United Steelworkers of America* v. *National Labor Relations Board*, 339 U. S. 382. These decisions were rendered in the Spring of 1949.

While the Labor Board took the position from the outset that it was not necessary for the officers of the CIO to comply in order for national or international unions affiliated with the CIO to be in compliance, it at the same time ruled that compliance by CIO officers was necessary in order for local industrial unions directly affiliated with the CIO to be in compliance. Local industrial unions are locals which are not affiliated with a national or international union but directly with the CIO. The officers or staff of the CIO service these unions, participate in their contract negotiations, etc., and it was on that basis that the Labor Board held that compliance by the officers of the CIO was essential to compliance by these local industrial unions.

Since the constitutionality of Section 9(h) had been upheld by the Supreme Court, and in order to make it possible for local industrial unions to be in compliance, the officers of the CIO who had not already done so filed non-communist affidavits shortly after the CIO convention in November, 1949, and the affidavits have been periodically filed by the CIO's officers since that time.

The question ruled upon by the Labor Board in October 1947, in the *Northern Virginia Broadcasters* case did not reach this Court until four years later in *Labor Board* v. *Highland Park Co.*, 341 U. S. 322 (1951). This Court, by a divided vote, overruled the construction which the NLRB had given the Act, and held that the international unions affiliated with the CIO were not in compliance with Section 9(h) until the officers of the CIO filed the affidavits.

During the period of more than two years which intervened between the effective date of the Taft-Hartley Act and compliance with Section 9(h) by the CIO, the NLRB, pursuant to its ruling in *Northern Virginia Broadcasters*, processed many

—probably several hundred—unfair labor practices initiated by charges filed by CIO affiliated unions. In the vast majority of these cases, both the charges were filed and the complaints were issued before CIO compliance. In a number of cases, however, like the present, CIO compliance intervened between the charge and the complaint.

Following the *Highland Park* decision, and pursuant to it, the Board dismissed the complaints in unfair labor practice cases before it in which the complaints had been issued at the instance of CIO affiliates in the period prior to CIO compliance. The Board also secured the remand to it of the unfair labor practice cases falling in this category which were pending in the courts, and had not gone to final judgment, and similarly dismissed the complaints in these cases. A total of some forty unfair labor practice complaints were thus dismissed by the Board.

The Board did not, however, interpret the *Highland Park* decision as requiring the dismissal of complaints in cases like the present, where CIO compliance had intervened between the charge and the complaint. For, as it has consistently since the passage of the Taft-Hartley Act, it interpreted Section 9(h) as requiring compliance at the issuance of the complaint, not at the filing of the charge. As we shall show, Congress, when it enacted the legislation, already referred to, to mitigate the retroactive effects of the *Highland Park* decision, likewise understood 9(h) to require compliance only at the time of the filing of the complaint.

The dismissal, as a result of the *Highland Park* decision, of the complaints which had issued prior to CIO compliance was a source of considerable distress to the labor unions and individuals affected. In addition, the *Highland Park* decision cast doubt on the status of thousands of collective bargaining contracts containing union shop provisions which had been negotiated by CIO affiliates in reliance upon Board authorizations issued during the period of CIO non-compliance. The *Highland Park* decision likewise cast doubt upon the status of certifications issued to CIO unions in representation proceedings conducted during the period of CIO non-compliance.

Accordingly the CIO asked Congress to give it relief from

these retroactive effects of the *Highland Park* decision. We asked that the outstanding union security contracts and certifications be validated. This the Congress did, the bill passing the Senate unanimously and the House with only a handful of dissenting votes. Public Law 189, 82nd Congress.

As respects the unfair labor practice complaints which the Board had dismissed because of the *Highland Park* decision, the situation was somewhat more complicated. We felt that the dismissal of these complaints imposed a hardship upon the unions and employees concerned. Many of these cases had been pending for years, and in most of them no issue of CIO compliance had ever been raised by the employer. It seemed to us highly inequitable, for example, that employees illegally discharged years ago for union activities should have proceedings looking to the redress of their rights dismissed because of a legal technicality never raised in their case.

This problem was, we stress, conceived to arise only with regard to cases in which the complaints had issued before CIO compliance, not to cases like the present where the CIO had complied after the charge and before the complaint. And even as to the cases where the complaints had issued before CIO compliance, we believed that the Board could and should issue new complaints upon the old charges. (This view has since been sustained by the General Counsel of the Board, but has not yet been passed upon by the Board or the courts.) While it was not entirely clear that the Board would issue new complaints, this doubt did not stem from the fact that the CIO was not in compliance when the charges were filed, but rather from fear that the Board would be unwilling to expend its limited manpower and budget in starting afresh in these old cases.

Because of our belief that the Board could issue new complaints on the old charges, and because the virtually unanimous agreement in Congress which made possible the enactment of the bill could not have been obtained on this issue, the CIO did not ask the Congress to validate the unfair labor practice complaints and subsequent proceedings invalidated by *Highland Park*, but only to validate union security contracts and representation certifications. Instead the Senators spon-

soring the remedial legislation agreed that while the legislation would not undertake to validate the old unfair labor practice complaints (and subsequent proceedings), it would be without prejudice to the right of the Board to issue new complaints on the old charges. To make sure that the remedial act was given this construction, a colloquy on the floor of the Senate was arranged between Senator Humphrey, who was in charge of the bill and Senator Nixon, who was one of its co-sponsors. The text of this colloquy (Congressional Record, 82nd Congress; First Session, Volume 17, Pages 10674-5) is as follows:

"Mr. NIXON. Mr. President, I think the Senator from Minnesota is aware of the fact that I have a number of constituents in California who have raised a question as to the effect of this bill on complaints issued by the Board following the Highland Park decision, on the ground that, at the time the complaints were issued, the parent CIO was not in compliance with the non-Communist affidavit requirement. I am informed with respect to one case in particular, involving a large number of employees and a large amount of back pay, that, on the basis of the decision in the Ohio Oil Co. case, that particular case has been dismissed by the Board, by reason of the Highland Park rule.

"Several of the employees, as well as officials of the company, have written to me. I have informed them that, in my opinion, this bill has no effect whatever on the pending cases. I wonder whether the Senator from Minnesota agrees with that interpretation.

"Mr. HUMPHREY. I fully agree with the interpretation which has been made by the Senator from California, in his reply to his constituents. I have checked this matter, as the Senator knows, with the attorneys for the National Labor Relations Board, as well as with the legal counsel for our committee, and they have all assured me that this bill would have no effect one way or other on complaints which are dismissed on the basis of non-compliance. This bill is directed, as I pointed out earlier, toward validating the representation elections and the union-shop elections, under section 9 of the Labor-Management Relations Act.

"Mr. NIXON. I am glad to note that the Senator agrees with that interpretation, because, as I now understand, the Ohio Oil Co. case, and all similar complaint cases, dis-

missed pursuant to the Highland Park rule, because the charging union was not in compliance when the complaint was issued, would be in exactly the same position, if this bill becomes the law, as before.

"Mr. HUMPHREY. The Senator is correct again in his conclusion. I should like to make it clear to him, however, that the oil workers should not be penalized because the CIO or the National Labor Relations Board took the position they did regarding the non-Communist affidavits. Personally, I believe that the general counsel of the National Labor Relations Board should issue a new complaint. That is my own personal opinion. But this bill—and I want this to be quite clear, so that the legislative history will be as it should be—this bill does not prejudge the general counsel's action, one way or other. In other words, those cases are separate entities, removed from the purview of this bill.

"Mr. NIXON. When the Senator from Minnesota suggests that the Board might well issue a new complaint I think he will agree with me that it is not in any way, as he has indicated, prejudging the merits of the complaint.

"Mr. HUMPHREY. I said that.

"Mr. NIXON. Yes. I agree with the Senator, I think the issue should be solved and resolved one way or the other.

"Mr. HUMPHREY. That is correct.

"Mr. NIXON. But I also think it is important for us to recognize that, so far as this bill is concerned, it in no way affects the merits or the potential decision which may be made in a pending case.

"Mr. HUMPHREY. The Senator is correct; and as I stated to the minority leader and to the Senator from Georgia, this particular bill pertains to the representation and the union-shop elections, as conducted under the terms of section 9(c) of the Labor-Management Relations Act, as affected by the Highland Park decision, and it is not and should not be prejudicial to the ruling on the part of the general counsel or the National Labor Relations Board, one way or other, insofar as the oil workers cases are concerned."

This decision clearly shows, we submit, that the Senators, like the Labor Board, understood Section 9(h) as requiring

compliance only at the filing of the complaint, and not at the filing of the charge. Thus Senator Nixon referred to the cases "dismissed pursuant to the *Highland Park* rule, because the charging union was not in compliance when the complaint was issued." Moreover, both the Senators agreed that the power of the Board to reissue these complaints would not be affected, one way or the other, by the remedial legislation: it, obviously, did not occur to them that the CIO's non-compliance when the charges were filed would bar reissuance. (That defect, if it were one, could, of course, not have been cured by new charges, since the six-month periods of limitation had long run.)

The history and enactment of this remedial legsilation likewise shows, we submit, that Congress did not wish to see CIO unions and members suffer hardships on account of CIO non-compliance prior to *Highland Park*. On the contrary, Congress with virtual unanimity, recognized that the CIO unions and members were equitably entitled to relief from the retroactive application of that decision.

The same considerations which moved the Congress to enact remedial legislation, should, we submit, move the court here to so interpret the statute as to mitigate its otherwise harsh consequences.

CONCLUSION

For the reasons stated, we respectfully submit that the decision of the court below should be reversed.

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